IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT

S.B.Civil Writ Petition No.159/2003

Lokendra Singh.

vs.

Board of Revenue and others.

Date : 11.7.2007

HON'BLE MR. PRAKASH TATIA, J.

Mr.MS Singhvi, for the petitioner.

Mr.M Shishodia a/w Mr.HL Kela) for the respondents.

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BY THE COURT :

REPORTABLE

Heard learned counsel for the parties.

The petitioner has challenged the judgment and decree dated 17.6.2002 (Annex.22) by which the Board of Revenue allowed the appeal of private respondents (legal representatives of defendant Tahir Ali) and set aside the judgment and decree dated 14.2.1997 (Annex.21) passed by the Revenue Appellate Authority and restored the judgment and decree dated 29.1.1991

(Annex.20) passed by the trial court.

Brief facts of the case are that the plaintiff/ petitioner filed suit for possession and injunction against the defendant/predecessor of the private respondents claiming that the plaintiff is khatedar tenant of land of Khasra No.1937/1 measuring only 4 biswas. The plaintiff also submitted that in the western side of the plaintiff's agriculture field, there are defendant's agriculture fields having Khasra No.1939 and 1940. The plaintiff described the neighbourhood of the defendant's agriculture field and submitted that the defendant is threatening to take possession of the land in question. It was prayed by the plaintiff that if the defendant succeed in taking possession of the plaintiff's land, then possession decree may be granted.

The defendant submitted written statement and admitted that the plaintiff is khatedar tenant of land of khasra no.1937/1 and its area is 4 biswas. However, the defendant showed his ignorance about the plaintiff's possession over the land in dispute despite the fact that he is adjoining neighbour of the land of khasra no.1937/1. The defendant nowhere stated that he has any right over the land or even on any part of khasra no.1973/1. In view of the above reasons, the

facts pleaded by the plaintiff were virtually admitted that the plaintiff is khatedar tenant of land of khasra no.1973/1 as well as this fact was admitted that the measurement of land in question is 4 biswas only. It appears that the plaintiff proceeded with the suit for getting the relief of possession also.

In the trial court, issues were framed and evidence was recorded. Twice Commissioner was appointed and Commissioner submitted report. The trial court decreed the suit of the plaintiff vide judgment and decree dated 29.1.1991 but that judgment and decree was reversed by the Revenue Appellate Authority, Banswara vide judgment and decree dated 14.2.1997. The Revenue Appellate Authority after considering both the Commissioner's reports as well as oral evidence produced by the parties, ordered the Tehsildar to carefully see the survey report and measure the land from fix point and deliver the possession of the land of khasra no.1937/1 measuring 4 biswas to the plaintiff. The Revenue Appellate Authority also decreed that the defendant's legal representatives shall not dispossess the plaintiff from the said land.

The judgment and decree of the Revenue Appellate authority was reversed by the Board of Revenue vide judgment and decree dated 17.6.2002 only on the ground that as per the Commissioner's report, Mahendra Singh

and Smt. Bharti were in occupation of land of khasra no.1937/1 and, therefore, the decree for possession against the private respondents could not have been passed by the Revenue Appellate Authority nor any injunction decree should have been granted by the Revenue Appellate Authority against the defendants.

Learned counsel for the petitioner submitted that it is a case of virtual no defence and the petitioner's case is admitted case that he is khatedar tenant of khasra no.1937/1 measuring 4 biswas. The defendant admitted that neither he is in possession of the part of land of khasra no.1937/1 nor he intend to take possession of said land. It is also submitted that both the Commissioner's reports were carefully considered by the first appellate court and oral evidence clearly shows that the plaintiff sought relief of possession only for the land of khasra no.1937/1 and that too for only 4 biswas which is the measurement of land of khasra no.1937/1. The plaintiff also disclosed the entire neighbourhood of the said land. That neighbourhood is also not in dispute. In that situation, the Board of Revenue committed illegality in setting aside the judgment and decree of the first appellate court when in fact, the judgment and decree of the first appellate court was executed and the possession was handed over to the plaintiff by the

Tehsildar concerned of the only land of khasra no.1937/1 and further in view of the fact that taking over possession of the land in question by the plaintiff was never challenged by the defendant. The petitioner has also placed on record the copy of the order dated 21.2.1997 (Annex.23) and the site report dated 1.3.1997 of the handing over possession of the land to the petitioner. It is submitted that it is clear from the site report prepared on spot while handing over the land to the plaintiff that the Tehsildar handed over possession of only khasra no.1937/1 and not handed over possession of any other land.

Learned counsel for the private respondents vehemently submitted that in the garb of the decree passed by the first appellate court, the plaintiff, in fact, wanted to dispossess them from the land which was in their possession. It is also submitted that when it has been proved by the respondents that the other persons are in occupation of the land of khasra no.1937/1, then no decree could have been passed against the respondents because of the simple reason that when the respondents had not committed any wrong, then they cannot be subjected to any decree for injunction. It is also submitted that in fact, the first appellate court carefully considered two

Commissioner's reports and those reports are not under challenge. Not only this, it is clear from the record that the evidence has come on record that other two persons were in possession of the land of khasra no.1937/1. It is also submitted that since the judgment and decree of the first appellate court dated 14.2.1997 has been set aside by the Board of Revenue, therefore, the respondents are entitled to take possession from the petitioner. It is also submitted by learned counsel for the respondents that their another land is having khasra no.1937/2 and the plaintiff cannot dispossess the respondents from land of khasra no.1937/2 and other two khasras no.1939 and 1940.

I considered the submission of learned counsel for the parties and perused the facts of the case as complete documents have been placed by the petitioner along with the writ petition.

It is clear from the reading of the plaint and the written statement itself that the plaintiff's khatedari right over the land of khasra no.1937/1 is not in dispute nor its area is in dispute. The defendant's clear case in the written statement was that he is not intending to dispossess the plaintiff. The defendant's denial about the possession of the plaintiff over the land of khasra no.1937/1 is absolutely vague and

because of this vague denial, under Order 8 Rule 5 CPC, it can be taken to be admission of the respondents that the plaintiff/petitioner is in possession of the land of khasra no.1937/1 and its measurement is 4 biswas. The plaintiff/petitioner when sought relief of possession of the land of khasra no.1937/1 measuring 4 biswas only and the first appellate court, after considering 2 Commissioner's reports along with other documents produced by the parties, directed the Tehsildar to see that the possession of the land of khasra no.1937/1 to be delivered to the plaintiff, the second appellate court should not have interfered in the decree passed by the first appellate court in such facts. When the respondents' own case that the petitioner is khatedar tenant of the land of khasra no.1937/1, then the respondents could not have any grievance against the decree passed by the first appellate court which very specifically provided that the Tehsildar shall deliver possession of the land of khasra no.1937/1 measuring 4 biswas only over which the respondents have no claim in the written statement or otherwise. The second appellate court's jurisdiction is limited as well as in the facts of this case, the Board of Revenue Committed serious error of law in reversing the judgment and decree of the first appellate court passed on the basis of total re-appreciation of the evidence which were carefully considered by the first

appellate court before recording finding of facts.

So far as delivery of possession to the petitioner after the judgment of the first appellate court on 11.3.1997 is concerned, it is clear that the Tehsildar after measuring the land handed over possession of the land of khasra no.1937/1 to the petitioner and it appears from the facts of the case that the respondents did not choose to raise grievance against delivery of possession to the plaintiff nor sought relief of redelivery of possession of any land if it was in possession of the respondent/defendant and was not the land of khasra no.1937/1. The respondents could have raised objection before even the first appellate court that the petitioner in violation of the decree of the first appellate court took possession of the land which was of the defendant. At the cost of repetition, it may be made clear that the decree was very clear and specific for the land of khasra no.1937/1 and that too measuring 4 biswas only. Therefore, even if the decree of the first appellate authority remains as it is, if the respondents were dispossessed from their land, from the land other than that of khasra no.1937/1 by the petitioner in execution or in pursuance of the decree of the first appellate court dated 14.2.1997, the remedy for taking back possession was very much available to the respondents in accordance with law

under Order 22 Rule 97 and 100 CPC. On the ground of wrong execution of the decree, the second appellate court could not have interfered in the judgment and decree of first appellate court because of the reason that wrong execution of decree cannot make the decree illegal.

In view of the above reasons, this writ petition is allowed, the judgment and decree of the Board of Revenue dated 17.6.2002 is set aside and the judgment and decree of the Revenue Appellate Authority dated 14.2.1997 is restored. No order as to costs.

(PRAKASH TATIA), J.

S.Phophaliya